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No. 486

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

TIDEWATER OIL COMPANY,
Petitioner,

vs.

GEORGE E. JACKSON and KARL B. JACKSON, Doing Business in Partnership As JACKSON BROTHERS,
Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Tidewater Oil Company, respectfully submits this brief in reply to respondents' brief opposing certiorari.

1. Respondents' "Statement of the Case."

Respondents' "Statement of the Case" (Respondents' Brief, 1-6)* presents a lurid picture of wrongdoing by

*Respondents' Brief Opposing Certiorari will be cited herein, for brevity, as Respondents' Brief. Other references will be to the Appendix to the Petition for Certiorari (e. g., A24) or to the record in the Court of Appeals (e. g., R10). All emphasis in this brief is supplied by us.

Tidewater. It is a melodramatic embellishment of findings which the District Court made, in an all-out adoption of respondents' contentions, as opposed to the position consistently maintained by Tidewater that "the conduct of secondary recovery operations in the vicinity of plaintiffs' lease has resulted in substantially greater recovery of oil from the reservoir by plaintiffs and in extensive benefits to the plaintiffs through their recovery of oil which they would not otherwise have recovered." (R40)

The Court of Appeals recognized that the District Court, in making its findings, credited respondents' witnesses "as against the contravailing and equally competent testimony of Tidewater." (A37) Of course if this case simply involved a choice between the testimony of one side or the other in a sharply contested trial, we would not be here praying for a writ of certiorari. The point in this case is that the respondents have had two chances, before different tribunals, to litigate the same issues. Respondents first followed the route prescribed in the Kansas statutes, seeking to stop Tidewater's secondary recovery program through a complaint before the Kansas Corporation Commission and on appeal in the Kansas courts. There they were completely unsuccessful in their attempts to show that Tidewater's actions were in any way unlawful or that they caused injury to respondents. Respondents then resorted to the Federal Court, which they were able to persuade to embrace their contentions, in square conflict with the findings and decision of the Kansas Commission, which had been reviewed and approved by the Kansas courts.

This conflict is so plain that the Court of Appeals is forced to concede that it exists. Comparing the findings of the District Court with the findings of the Kansas Commission, the Court of Appeals says (A36):

> "These findings are, to be sure, *irreconcilably inconsistent with the conclusive administrative findings* to the effect that the water flooding operations were carried on in a lawful manner."

The Court of Appeals also was unwilling to endorse the part of the District Court's judgment penalizing Tidewater by assessing punitive damages. Recognizing that "no one can deny the validity of the order permitting Tidewater to water flood its properties, or that the water flood operations were being conducted in accordance with a valid order" (A32), the Court of Appeals eliminated punitive damages because Tidewater's acts "were committed under color, and in accordance with, Kansas law" and they were "lawfully undertaken and lawfully done, in the interest of conservation." (A39)

The issue is therefore squarely presented in this case: Can Tidewater be mulcted in damages for conducting a conservation program, lawfully undertaken and lawfully done pursuant to a valid order of the Kansas Commission, on the basis of new and independent findings of the Federal Court which are "irreconcilably inconsistent" with the Kansas Commission's findings on the specific complaint by respondents against this very same water flood program?

2. The Kansas Commission's Finding That There Had Been No Injury to Respondents' Correlative Rights.

The Court of Appeals sought to avoid the binding effect of the Kansas Commission's decision by interpreting the Kansas Commission's Memorandum Opinion to be a holding that on the issue of correlative rights "there was nothing for the Commission to decide." (A28)

This pivotal holding of the Court of Appeals is plainly contrary to the actual decision of the Corporation Commission, that there had been no injury to respondents' correlative rights. Even the respondents do not argue that the Commission failed to determine that there was no injury to correlative rights. In substance and effect, they recognize, as they are forced to do, that the basic reasoning of the Court of Appeals (that the issue of injury to correlative rights was not decided by the Commission) is erroneous. Adopting an entirely different theory, respondents argue that "*the Commission's determination that there was no injury to correlative rights shown* was not tantamount to a finding that there was no damage to Jackson Bros.' property." (Respondents' Brief 9)

To support their contention, respondents take the astonishing position that "correlative rights" has nothing to do with the "property or property rights" of respondents in their oil and gas properties. They seek to make a distinction obviously contrary to elementary principles of the law of oil and gas.

Since oil and gas in underground reservoirs are fluids which move in response to differentials in pressure, without regard to property lines, and since the operations of any producer (in either primary or secondary recovery) unavoidably affect the property of other producers in the same common reservoir, the courts have long recognized that unique relationships exist between different producers, with regard to their property rights, which have usually been covered by the phrase "correlative rights." These property rights become particularly important when, in order to prevent waste and to insure maximum recovery of oil and gas, a state statute or administrative order regulates production. Such regulations usually provide that the authorized methods of production shall protect the

property rights of the various owners in the common reservoir in relation to each other or, in other words, their "correlative rights." This was recognized at an early time by a decision of this Court, as is stated in Summers, "Oil and Gas" (Permanent Edition, 1938), Section 63, pages 179-181:

> "The courts, particularly Chief Justice White in Ohio Oil Company v. Indiana, [177 U.S. 190] supported the constitutionality of such statutes on the ground that there was no taking of private *property* but merely a regulation of existing *property relations*. These existing *property relations*, called the *correlative rights* of the owners of land in the common source of supply, were not created by the statute, but held to exist because of the peculiar physical facts of oil and gas. The term '*correlative rights*' is merely a convenient method of indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil and gas therefrom by lawful operations conducted on his own land limited, however, by duties to other owners not to injure the source of supply and by duties not to take an undue proportion of the oil and gas."

In a more recent text, the author, referring to the rights of owners of land overlying a common source of supply of oil and gas, says (Kuntz, "Law of Oil and Gas," (1962), Section 4.3, page 95):

> "The term '*correlative rights*' is a term used to refer to all of the rights and duties that exist between such landowners with regard to operations in a common source of supply."

In view of these standard authorities which state, so far as we know, the universally recognized meaning of "correlative rights," respondents are unjustified in accusing

petitioner of "a play on words" or "weasel-worded argument" (Respondents' Brief 9, 22) in saying that the determination by the Kansas Commission that there was no injury to respondents' correlative rights was a decision that there was no injury to respondents' property or property rights.

Nor can respondents sustain their endeavor to place an artificially restricted meaning upon "correlative rights" as defined by the Kansas Commission. The Commission's definition of "correlative rights" is as follows (A66):

> "Correlative Rights shall mean that each owner or producer in a common source of supply is privileged to produce therefrom only in such manner or amount as not to injure the reservoir to the detriment of others or to take an undue proportion of the oil or gas obtainable therefrom, or to cause undue drainage between developed leases."

Of course to "produce" oil and gas from a common source of supply involves far more than simply turning a valve or operating a pump so that the oil or gas will flow to the surface. It includes all of the operations which have as their ultimate object the recovery of the oil and gas. Specifically, it includes water flooding in secondary recovery operations. As the Court of Appeals itself recognized (A24):

> "Water flooding is a legally and scientifically accepted *method of producing oil and gas* by the introduction of foreign water into an oil bearing formation, usually after primary production methods are no longer profitable."

A fair consideration of respondents' complaint in this case can leave no doubt that they sought recovery on the ground that the "manner" used by Tidewater to "produce"

oil and gas from its leases caused damage to respondents, by injuring the reservoir beneath their lease to their detriment by displacing oil and gas with salt water and making it more expensive or impossible to recover part of the oil and gas, and by causing undue drainage of oil and gas from respondents' lease to other parts of the reservoir. Every one of the elements of damage which respondents contended for, as listed in their brief (page 11), is simply some alleged aspect of the total result of the asserted injury to the reservoir and undue drainage of oil and gas from their lease.

Respondents argue in effect that "correlative rights" relate only to the relative rate of withdrawals. This argument is plainly unsound. The regulation of the relative rates of withdrawals as between wells owned by different producers is only *one* way of protecting correlative rights. Such orders are usually called "proration orders." This case, however, involves not the rates of withdrawals but the "manner" of production, through water flooding. The opinion of the Commission clearly states that the question of withdrawals (the *amount* produced) is not involved, and that the *manner* of Tidewater's production, which was the basis of respondents' complaint, does not cause any injury to respondents' correlative rights, but is reasonable and in fact is the only way in which correlative rights can be protected. Respondents significantly omit a part of the Commission's opinion (Respondents' Brief 10), and we therefore quote the Commission's opinion, with the omitted sentence in its proper place, so that the Court may have before it in proper context the Commission's determination (A51):

> "The question of withdrawals from the common reservoir is not presented in this complaint involving the flooding of producing wells by water injected dur-

ing a lawful water flood operation. *In a water flood of this type the only way to prevent the movement of oil from lease to lease and thus protect correlative rights is to place the injection wells on the lease boundary.*

"Commission jurisdiction in matters involving production of oil and gas is by statute limited to the prevention of waste and the protection of correlative rights. No waste of natural resources *nor injury to correlative rights having been shown*, it appears that the instant proceeding presents no justiciable matter for action by this Commission."

The Commission plainly meant that, no waste nor injury to correlative rights having been shown, no case was presented which would justify action by the Commission in stopping the water flooding. The Commission therefore dissolved the temporary cease and desist order and dismissed the complaint.

The Commission's statement (A47-48, 50) that it was not the proper forum for awarding compensatory damages is not in any way inconsistent with its finding that there was no injury to correlative rights. A judgment for damages is a *remedy* which the Commission could not grant, but this does not mean that it had no jurisdiction to decide whether respondents' correlative rights had been violated. The Commission did have authority to grant another remedy in the form of a cease and desist order if it had found that there was injury to respondents' correlative rights. The Commission refused to grant that remedy because it found that there was no such injury shown. This is the same pivotal question, involving the same "operative facts" (A32) upon which respondents' claim in this action rests. This question having once been litigated and decided against them, they cannot by seeking a different remedy in another forum gain a right to a second determination of the same issue.

3. The Defense of Estoppel by Judgment Is Fully Supported by Kansas Law; and the Decision of the Court of Appeals Is in Conflict with Applicable State Law.

Petitioner before this Court has stressed the opinion of the Supreme Court of Kansas in *Jackson* v. *State Corporation Commission*, 186 Kan. 6, 348 P.2d 613 (1960), because it is the decision of the highest court of Kansas determining the pivotal issue in this case in petitioner's favor, in previous litigation between the same parties. There could not be, we submit, a clearer or more specific conflict between a decision of a Court of Appeals and the applicable state law than in the situation which is here presented, where the Court of Appeals has reached a conclusion directly contrary to the final adjudication of the very same basic issue which was decided in previous litigation between the same parties by the highest court of Kansas.

On the Kansas law of estoppel by judgment, there was no need for petitioner to cite Kansas authorites because the Court of Appeals recognized the Kansas law to be as follows (A29-30):

> "Kansas adheres to the salutary rule which plainly forbids a suitor to twice litigate matters against the same party, even on a different cause of action."

Specifically, as to the binding effect in general of the determinations of the Kansas Corporation Commission, the Court of Appeals further said (A30, 31):

> "We think, however, that a suitor may have a full day in court in an administrative tribunal, on matters within its competence, quite as effectively and conclusively as any other adjudicatory tribunal.

"The determinations of the Kansas Corporation Commission, of matters within its competence, is undoubtedly binding here, insofar as applicable to this asserted claim."

Since the Court of Appeals, in the passages just quoted, had correctly stated the Kansas law, there was no need for petitioner to cite cases to support these holdings. The conflict with applicable state law arose when the Court of Appeals refused to follow the Kansas law as decided in the previous litigation between the same parties, as to respondents' complaint that Tidewater's water flooding was wrongful because it injured respondents' correlative rights. The decision of the Court of Appeals is in direct conflict on that issue with the decision of the highest court of Kansas that Tidewater's water flooding was not wrongful and should not be stopped, because it was not shown to cause injury to respondents' property rights.

Respondents, therefore, evidently realizing that if the usual rules of estoppel by judgment are applied in this case they would not be entitled to a second litigation of the same basic issue previously decided against them, take the position that the Court of Appeals was wrong in stating the Kansas law as to estoppel by judgment. Respondents contend that Kansas law is (a) that an adjudication of an issue in a suit for injunctive relief is not binding in a subsequent damage suit between the same parties on the same facts (Respondents' P of 14), and (b) that a decision of an issue in administrative proceedings does not constitute a bar or estoppel in subsequent actions between the same parties in a court of general jurisdiction. (Respondents' Brief 16)

Respondents do not deny that the law generally accepted is what the Court of Appeals called "the salutary rule which plainly forbids a suitor to twice litigate matters

against the same party, even on a different cause of action." (A29-30) They assert, however, that there is a peculiar rule in Kansas to the contrary. The cases they cite do not support their contention.

In *Hofstetter* v. *Myers Construction, Inc.*, 170 Kan. 464, 227 P.2d 115 (1951), discussed in Respondents' Brief, page 14, the plaintiff first brought a damage suit in the County Court and obtained judgment, the defendant then appealing the case to the District Court. While this damage suit was pending in the District Court, the plaintiff and others brought an injunction suit relating to the same matter in the District Court. In the injunction suit, an injunction was granted, but on some issues findings were made adverse to the plaintiff. Later, when the damage suit went to trial in the District Court, the question was raised whether the adverse findings in the injunction suit were binding on the plaintiff in the damage suit. The Court stated the question before it as follows (227 P.2d at 118):

> "The question with which we are confronted, however, is whether under the peculiar circumstances the judgment in the later injunction action is res judicata of the issues in the earlier damage action."

The Court held that the findings in the injunction suit were not a bar to recovery in the damage suit, *because the suit for damages was limited to conditions existing before the injunction suit was brought*, whereas the injunction was based on the facts existing at the later time when the injunction suit was tried. As the Court said (227 P.2d at 119):

> "For anything that appears in the record the manner in which the plant was operated, which plaintiffs in the damage action urged damaged them, could

have been corrected by the time the injunction action was tried."

In other words, estoppel by judgment was denied, not because an injunction was sought in one suit whereas damages were sought in the other suit, but because the matter at issue in the damage suit involved conditions *at a different time* from those at issue in the injunction suit. This situation obviously does not exist here, because Tidewater's water flooding program, from its beginning until it is finally completed according to plans, was involved in the Kansas proceeding and likewise is involved in this action.

The Chanute Brick & Tile Company v. *The Gas Belt Fuel Company*, 89 Kan. 177, 130 Pac. 649 (1913), discussed in Respondents' Brief, page 15, was a case in which only a very brief *per curiam* opinion was written by the Court. However, in that case also, it is clear even from the brief opinion that the reason estoppel by judgment was not applied was not the difference in the remedy sought but because the subsequent litigation involved a matter not in issue in the first suit. Immediately following what respondents quote in their brief, the Court says in its opinion (130 Pac. 650):

"The evidence in the first suit could not have tended to sustain the issue here."

The other cases cited by respondents in a footnote on page 15 of their brief do not establish any peculiar rule of estoppel by judgment in Kansas. All that these cases hold is that a party relying upon estoppel by judgment must show that the issue in the second litigation was actually raised and determined in the first suit. If, as in the present case, *the same basic issue was raised and was determined*, then the fact that the plaintiff in the second suit

is asking for damages rather than for injunctive relief makes no difference.

With reference to respondents' second contention, it should be noted that the issue of alleged injury to respondents' correlative rights by Tidewater's water flooding was decided against respondents not only by the Kansas Commission, but upon appeal its decision was fully reviewed and in all things approved by the Kansas courts. It might be that a decision by the Commission alone, regarding its jurisdiction, would not be binding as a matter of law as to the construction of the relevant Kansas statutes. However, that is not the situation here. The Kansas Supreme Court has not only approved the findings of the Kansas Commission, but it has also held that its conclusions were correct as a matter of law.

The cases cited by respondents do not sustain the conclusion that estoppel by judgment is not applicable because the original decision against respondents was made by an administrative agency.

Renner v. *Monsanto Chemical Company*, 187 Kan. 158, 354 P.2d 326 (1960), discussed in respondents' brief, pages 7, 17, was a suit by a landowner to cancel an oil and gas lease. The lessee asserted that an order of the Corporation Commission, allocating production under a proration statute and attributing the acreage in question to wells drilled on other lands, was binding upon the question whether the plaintiff's land had been adequately developed. The order in question was a general order applicable to a large number of fields and pools, and there is nothing in the opinion to indicate that the landowner was a party to proceedings before the Corporation Commission resulting in the proration order or that there had been any judicial review of that order. Moreover, the Kansas Supreme Court

significantly points out that, in the first place, the Commission was not authorized by the Kansas statute to regulate the spacing of wells or to establish drilling units and that the proration order, relating to the attribution of acreage to producing oil wells, was not a finding by the Commission that the well would in fact drain the particular acreage but was simply for the purpose of insuring that the well in question would receive a fair share of the allowable production. Such being the construction the Court placed on the Kansas statutes, the conclusion naturally followed that the proration order had no bearing on the obligation of the lessee to develop the leased premises. This is made clear by a part of the opinion not quoted by the respondents, which reads as follows (354 P.2d 336):

> "The duty to drill wells under the covenant is not changed since proration involves only the restriction of production after the wells are drilled.
>
> "The purpose of the order attributing specific acreage to the south four Renner wells was only to establish a proration formula for each well to insure its fair share of the state's market for crude oil produced from the Cooper Field, and it did not constitute a finding that those wells would adequately and effectively drain the acreage attributed, or preclude judicial review of the plaintiffs' claim of a breach of the implied covenant to protect the premises against drainage."

Gas Service Company v. *Consolidated Gas Utilities Corporation*, 145 Kan. 423, 65 P.2d 584 (1937), discussed in respondents' Brief, page 17, involved an attack upon thirty-seven resolutions passed by the City of Wichita, on the ground that they had not been adopted in compliance with a statute requiring that ordinances should be read and published three times. The prior litigation between the same parties did not involve these ordinances, but

earlier ordinances, which were attacked on entirely different grounds. This point was noted in the opinion of the Kansas Supreme Court as follows (65 P.2d at 591):

> "The ground upon which plaintiff argues here that the thirty-seven subsequent resolutions are invalid was not raised by those pleadings in that hearing as to Ordinance No. 10-306 for the obvious reason that it had been passed in conformance with G.S. 1935, 13-2801. Neither was the validity of the three subsequent ordinances that had already been passed raised in that proceeding. The only question tried out before the Commission was whether public convenience and necessity would be served by permitting the companies to enter the field."

The Kansas Supreme Court then says that on the question of fact as to whether public convenience and necessity would be served by granting the franchise, the Court "would not overturn a finding of fact reached by an administrative tribunal such as the Commission." The Court goes on to say, in the language quoted in respondents' brief, page 16, that on the legal question as to whether the thirty-seven subsequent ordinances were passed in conformity with the statute, the decision of the Commission "would not have had the binding effect of a judicial determination." (65 P.2d 591) It is submitted that the Kansas court was simply noting the difference between the effect of a fact finding by an administrative agency on a matter within its jurisdiction and its legal conclusion as to the interpretation of a statute. Fact-findings of the agency are binding on the court if there is substantial evidence to support them, but legal conclusions are not binding on the court, unless as in this case those conclusions have been judicially reviewed and approved by the highest court of the state having jurisdiction.

State ex rel. Boynton v. *Public Service Commission*, 135 Kan. 491, 11 P.2d 999 (1932), discussed in Respondents' Brief, page 17, involved the question of the validity of a statute which authorized the Public Service Commission upon the complaint of a shipper to investigate and determine whether a carrier was charging an unreasonable rate and to issue a certificate as to what was a reasonable rate or charge, "which shall be prima facie evidence of the matter therein stated." The Court held that the statute was valid, as against the objection that it gave the Public Service Commission authority to award a final judgment for damages in reparation for excessive charges. Immediately after saying what is quoted in Respondents' Brief, page 17, the Kansas court said (11 P.2d at 1002):

> "The recitals of the certificate are prima facie evidence if or when demand for reparation becomes the subject of controversy before a court of competent jurisdiction. It is settled law that the Legislature may prescribe what matters shall have the force of prima facie evidence."

This holding that the statute was valid in making the certificate of the Commission prima facie evidence that excessive rates had been charged, is no authority against the application of the rule of estoppel by judgment in the present case where, pursuant to Kansas statutes, the Corporation Commission's order determining that respondents' correlative rights had not been injured, has been reviewed and affirmed by the Kansas courts, both as to the findings of fact and the legal conclusions upon which the order was based.

Other cases cited by respondents in the footnotes on page 19 of their brief are not discussed by respondents and we see no point in discussing them here. They do not relate to situations comparable to the case here and,

in general, deal with administrative orders which were legislative or executive in nature. Obviously such orders are substantially different from decisions, such as in this case, where the proceedings before the Corporation Commission were instituted by the filing of the "complaint" by Jackson Brothers as "complainants" against Tidewater, as "defendant" (R18), containing the usual elements of a pleading alleging injury to respondents' oil and gas properties as a basis for relief in the nature of an injunction to stop Tidewater's water flooding (R18-22) and where the Commission proceeded to hear evidence and made its findings and conclusions in the form of a "memorandum opinion." (A41) The proceedings in this case before the Commission had every essential element of a judicial proceeding. This case is wholly different from one where an administrative agency issues a legislative or executive order.

Respondents in their brief (page 23) call attention to the fact that the Kansas Corporation Commission is not a party to this action. This fact only serves to emphasize that the proceedings before the Kansas Commission were essentially judicial in character and that the Commission, in passing upon Jackson Brothers' complaint against Tidewater, was acting in an impartial and not in a partisan role. There is no more reason why the Kansas Corporation Commission should seek to intervene in this case to defend its determination than there is for the Judges of the Supreme Court of Kansas to intervene and defend their judgment approving in all respects the findings and conclusions of the Commission.

4. Since the Decision by the Kansas Commission and the Kansas Courts Was Not Only That Tidewater's Operations Were Lawful but Also That They Did Not Cause Injury to Respondents' Correlative Rights, This Previous Decision Precludes Any Recovery by Respondents on Any Theory of Liability.

The decision by the Kansas Commission and the Kansas courts that Tidewater's water flooding should not be enjoined was on the ground that, under the facts as found by the Commission, the water flooding did not cause waste and it did not cause injury to Jackson Brothers' correlative rights. The water flooding could not be lawful if it caused either waste or injury to respondents' correlative rights. The determination that Tidewater's actions were lawful is therefore inseparable from the determination that its actions did not cause injury to respondents' correlative rights. This case is therefore entirely different from cases such as those involving condemnation proceedings, where actions may be lawfully taken even though damage may necessarily follow. The respondents are therefore barred from recovery of damages in this case, not only because there has been a conclusive adjudication that Tidewater's water flooding is lawful under Kansas law, but also because there has been a final adjudication against Jackson Brothers that Tidewater's water flooding did not injure Jackson Brothers' property rights. On no theory of liability can there be any recovery of damages where no injury is shown.

Certainly we do not contend that one producer can destroy the property of another, wilfully or negligently, without responsibility for the tortious act, nor do we contend that one man's property can be taken directly or indirectly without compensation for the benefit of another.

To answer directly respondents' arguments (Respondents' Brief 21-22), what we do contend is that where the state authorities have provided a means, which respondents in this case have taken advantage of, to have a determination made as to whether a secondary recovery program causes injury to their property rights, respondents are bound by the determination against them and cannot go into a different tribunal and have the very same issue litigated all over again. We submit that this conclusion is applicable with particular force where, as in this case, the questions involved are pure questions of state law and where the losing litigants in the state courts have switched their forum to the federal courts in the hope of securing more favorable results.

None of the cases cited by respondents to sustain their claim that Tidewater can be held liable in damages for its lawful actions are in point in this case.

Helms v. *Eastern Kansas Oil Company*, 102 Kan. 164, 169 Pac. 208 (1917), discussed in Respondents' Brief 20, 22, was simply a suit for damages resulting from a nuisance caused by the escape of waste oil and sediments from the defendant's refinery into a water course which passed across the plaintiff's land. The plaintiff in that case particularly alleged a cause of action for a "nuisance." (169 Pac. at 209) The Kansas court does quote in its opinion general language from the opinion in *Hauck* v. *Pipe Line Co., Ltd.*, 153 Pa. St. 366, 375, but the reason that the Kansas court holds that the defendant was liable for the nuisance was that it found that the particular acts complained of by the plaintiff in that case were both unreasonable and unlawful (169 P.2d at page 210):

> "When the injurious substances were thrown upon the plaintiff's land in the excessive quantities and in the manner set forth in plaintiff's petition, the de-

fendant's use of its property became *both unreasonable and unlawful.*"

The *Helms* case is therefore clearly not analogous to the present case. Here the particular acts of Tidewater complained of by Jackson Brothers have been adjudicated to be lawful and reasonable by the Kansas Supreme Court in approving the findings and conclusions of the Kansas Corporation Commission. The *Helms* case is no authority for imposing liability upon Tidewater for its lawful acts, and most certainly it is no authority for a second litigation of the issue as to whether Tidewater's actions injured Jackson Brothers' property rights in the oil reservoir.

Respondents also cite three cases alleged to show that a party blasting with dynamite will be held responsible for damage to adjoining property even where the blasting is done under a permit from some public authority. It is submitted that the cases do not even support the statement of their holding as contained in respondents' brief. We cannot find anything in the opinion in *City of Cherryvale* v. *Studyvin*, 76 Kan. 285, 91 Pac. 60 (1907), indicating that any permit for blasting was obtained, the court simply holding that the city in that case was not excused from the exercise of reasonable care in blasting. In *Rost* v. *Union Pacific Railroad Company*, 95 Kan. 713, 149 Pac. 679 (1915), the opinion says that "a permit" had been secured by the railroad, but the opinion does not disclose from whom the permit had been obtained or what its provisions were or whether the defendant's acts conformed to the requirements of the permits. In *Bacon* v. *Railway Company*, 109 Kan. 234, 198 Pac. 942 (1921), it affirmatively appears that the basis for liability was that the blasting was not done in conformity with the permit. Reviewing the evidence, the court says (198 Pac. at 944) that "the necessary inference is, the defendant abused its permission

. . ." using heavy charges located at points not authorized in the permit and causing damage that would not have occurred if the limitations of the permit had been observed.

In none of the cases just discussed, nor in the other cases cited without discussion by respondents on page 21 of their brief, was there involved the same question as is presented here, where there has already been a litigation before a competent state tribunal of the pivotal question which is the basis for asserted liability in this case.

5. The Fact That the Kansas Commission Could Not Give a Judgment for Damages Does Not Mean That Its Decision That Jackson Brothers Had Not Suffered Any Injury to Their Correlative Rights Would Not Be Binding upon Jackson Brothers in a Later Damage Suit.

Of course the Kansas Corporation Commission could not enter a judgment for damages for alleged injury to the property rights of one producer as a result of the operations of another producer in the same reservoir. In this sense, and only in this sense, did the Commission lack power "to adjudge tort liability." The Commission did have jurisdiction to determine controverted issues of fact which would be crucial in determining tort liability as well as in determining whether the Commission should enter an order requiring the defendant operator to cease the operations complained of. Specifically in this case, the Commission had to determine, and it did determine, that Tidewater's water flooding did not injure Jackson Brothers' correlative rights before the Commission could lawfully refuse Jackson Brothers' prayer to stop the water flooding by Tidewater. This same issue, as to whether Jackson Brothers were injured or on the other hand were

benefited by Tidewater's water flooding, is the pivotal question in this damage action.

The Court of Appeals has in fact on this issue made two inconsistent statements of the law. Near the beginning of its opinion, it says (A31):

> "The determinations of the Kansas Corporation Commission, of matters within its competence, is undoubtedly binding here, in so far as applicable to this asserted claim."

We respectfully submit that it is impossible to reconcile what the Court of Appeals correctly says is the law in the passage just quoted above, with what it later says as its reason for refusing to sustain the defense of estoppel by judgment (A32):

> "It is wholly inadmissible and incompatible with fundamental principles of due process to hold that a tribunal, possessing no power to adjudge tort liability, may nevertheless deprive a tort claimant of his day in court on that basis, by conclusive adjudication of the operative facts upon which his claim must rest."

The answer to this latter, inconsistent statement is obvious. *Respondents have had their day in court* in the previous litigation, where there was a determination of the same "operative facts" upon which their claim must rest in this case. The Kansas District Court specifically held that Jackson Brothers "have now had their day in court and had a determination of their correlative rights." (A53) The Kansas Supreme Court upon appeal noted that the trial court had held that "plaintiffs had now had their day in court and their correlative rights had been determined" (A61), and the Kansas Supreme Court held

that the trial court was correct in affirming the decision of the Commission based on its findings. (A63)

Surely every requirement of due process has been amply satisfied where not only has the administrative agency given a full hearing and decided the issues made by the parties' pleadings and evidence, but also its decision has been reviewed and affirmed by courts of competent jurisdiction.

Tidewater has already gone through one protracted litigation before the Kansas Commission and in the Kansas courts defending its same water flooding program against the same complaints of injury which Jackson Brothers assert in this proceeding. Tidewater should not be required to litigate all over again in the federal courts the same basic issues as to the "operative facts" which were finally decided in Tidewater's favor by the Kansas courts.

CONCLUSION.

Respondents attempt to belittle the importance of this case (Respondents' Brief 23) by saying that while the amount of the judgment is large, the case is of no consequence to anyone except the parties. Once again respondents' argument runs counter to self-evident reality. How will it be possible (if the Court of Appeals' decision is not corrected) for an oil producer to proceed with confidence with a secondary recovery program knowing that the competent state agency and the state courts may be "second guessed" by the federal courts and that he may be penalized by a huge judgment for damages for doing the very same things that have been authorized and approved by the state authorities as a means of conserving the state's natural resources and as a proper method to be

employed for the protection of the correlative rights of other producers in the same common reservoir?

The crippling effect of the decision of the Court of Appeals upon secondary recovery programs is obviously of grave public concern. The memorandum opinion of the Kansas Corporation Commission, in this case shows that Tidewater's water flooding program will "permit the recovery of oil and gas which would otherwise be lost," that the cumulative production from Tidewater's secondary recovery project in this reservoir, from 1949 to 1956, was "some 2,327,785 barrels of oil from approximately 900 acres" and that comparable secondary recovery can be expected from additional areas in the same reservoir through continued water flooding (A50). It can hardly be said under such circumstances that the result of stopping this water flooding program would be "of no consequence to anyone except the plaintiffs and the defendant."

Of course it is senseless to argue that Tidewater's water flooding project has not been "interfered with." (Respondents' Brief 23). Nothing could paralyze secondary recovery programs quicker than a huge judgment for damages for doing what even the Court of Appeals holds to be acts which were committed "under color and in accordance with Kansas law" and were "lawfully undertaken and lawfully done in the interest of conservation." (A39)

It is submitted that the conflict between the decision of the Court of Appeals and the applicable Kansas law is not merely a matter of private concern. It is also an important matter of public concern, relating directly to the administration of justice as between the state and federal courts. For these reasons petitioner prays that the writ

of certiorari be granted and the judgments below be reversed.

Respectfully submitted,

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